83-1546

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

GLORIA F. ANDERBERG, *as Conservatrix of the Estate of Steven B. Stichler, and* GLORIA F. ANDERBERG, *individually, Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GLORIA F. ANDERBERG
1540 Grant Street
Apartment 23
Denver, Colorado 80203

February 16, 1984

QUESTIONS PRESENTED

1. Whether "filing" for purposes of requests for reconsideration within the context of 28 C.F.R. § 14.9(b) is accomplished by timely mailing to the appropriate administrative agency within the appropriate six (6) month period.

2. Whether the six (6) month time period for requesting administrative reconsideration runs from the receipt of the notice of denial or from its mailing.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statutory provisions involved	2
Administrative regulations involved	2
Statement of the case	3
Reason for granting the writ	4
Conclusion	6
Appendix	7
Opinion of Court of Appeals	App.
Order for Summary Judgment of Dismissal by District Court	App.
Order Denying New Trial by District Court	App.
Judgment of Court Appeals	App.
Judgment of Dismissal of District Court	App.

TABLE OF AUTHORITIES

Cases:

Steele v. United States of America, 390 F. Supp. 1109 (S.D. Cal 1975) 4

Statutes:

28 U.S.C. § 2401(b) 2, 4

Administrative Regulations:

28 C.F.R. § 14.9(b) 1, 4, 5

IN THE

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GLORIA F. ANDERBERG, *as Conservatrix of the Estate of Steven B. Stichler, and* GLORIA F. ANDERBERG, *individually, Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner Gloria F. Anderberg respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 14, 1983.

OPINION BELOW

The opinion and judgment of the Court of Appeals appear in the Appendix hereto. The opinion and judgment of the District Court appear there also.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 14, 1983. An application for extension of time in which to file this petition for certiorari was filed on January 12, 1984. This Court, per Byron R. White, granted that application and extended the time for filing until February 26, 1984. This petition was filed on or before February 26, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 1257(3).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 2401(b). Time for commencing action against United States

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

ADMINISTRATIVE REGULATIONS INVOLVED

Code of Federal Regulations, Title 28:

§ 14.9(b). Final denial of claim

Prior to the commencement of suit and prior to the expiration of the 6-month period provided in 28 U.S.C. § 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request for re-

consideration of a final denial of a claim under paragraph (a) of this section. Upon timely filing of a request for reconsideration the agency shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's options under 28 U.S.C. § 2675(a) shall not accrue until 6 months after the filing of a request for reconsideration. Final agency action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

STATEMENT OF THE CASE

The petitioner had her administrative claim for damages under the Federal Tort Claims Act, presented to the Veterans Administration in Denver, Colorado, denied by registered letter dated and mailed on October 30, 1980, and received on November 3, 1980.

The petitioner sought reconsideration by a letter dated and sent by regular mail on April 30, 1981, and received in the Office of District Counsel of the Veterans Administration on May 1, 1981. Reconsideration was denied as not being timely requested. The petitioner brought suit on her claim, and the district court, upon the Government's motion for summary judgment, dismissed the suit for lack of jurisdiction based on the untimely filing of the request for reconsideration. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1346(b) and 2675.

The petitioner appealed this dismissal to the United States Court of Appeals for the Tenth Circuit and that court affirmed the judgment of the district court.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW IS IN ERROR AND IT IS THE ONLY FEDERAL APPELLATE DECISION WHICH DEFINES "FILING" FOR PURPOSES OF 28 C.F.R. § 14.9(b).

28 C.F.R. § 14.9(b) provides that a request for reconsideration shall be filed within six months of the date of mailing of the notice of denial of the claim by the agency to which it was initially presented.

This case turns on whether "filing" means mailing or receipt for purposes of 28 C.F.R. § 14.9(b). That is, there is no disagreement that the petitioner's request for reconsideration was mailed within the six month period beginning October 30, 1980 and ending April 30, 1981. And, there is no disagreement that the petitioner's request for reconsideration was not received within that period. So, if the appropriate six month period begins October 30, 1980 and ends April 30, 1981 and if "filing" means receipt within the context of 28 C.F.R. § 14.9(b), then the decision below is correct. But, if "filing" means mailing in that context, then the decision below is in error and should be reversed.

Administrative proceedings and regulations are meant to be, and are by their very nature, less formal and less strict than judicial proceedings and legislative statutes. Consequently, while "presentment" within the context of 28 U.S.C. § 2401(b) has been judicially determined to mean receipt, *Steele* v. *United States of America*, 390 F. Supp. 1109 (S.D. Cal. 1975), there is no good policy reason for insisting that "filing" within the context of 28 C.F.R. § 14.9(b) means receipt by the appropriate Federal agency.

Given our modern Federal postal system is an orderly and efficient system for determining if timely steps in an

administrative proceeding have been taken, there is good reason for this Court to allow that "filing" includes mailing for purposes of requests for reconsideration. And that good reason is that administrative proceedings are less formal and less strict in nature and that mailing, being less formal and less strict than receipt, fits in well with this informal system.

Further, "filing" for purposes of 28 C.F.R. § 14.9 is nowhere defined. So, the party requesting reconsideration is not put on notice that timely mailing is not an effective method for requesting reconsideration. And, in the absence of such notice, our 1980's ways of communicating strongly support the view that a timely request for reconsideration is filed upon either deposit in the regular mails of such a request properly addressed to the proper recipient or deposit in the certified mails of such a request.

Secondly, the petitioner did not receive the notice of denial until November 3, 1980. And, for the Government to be allowed to begin this six month period by an act of mailing and then to insist that actual receipt of the request for reconsideration must be accomplished within the period measured by this mailing is for the Government to have its cake and eat it too. That is, if actual receipt is necessary for a request for reconsideration, then actual receipt of the Government's notice of denial ought to control the beginning of the period as well. And, if that is so held by this Court, then the request for reconsideration was received within the six month period beginning November 3, 1980 and ending May 3, 1981 by the appropriate Federal agency. Any other interpretation would deny to the petitioner a full six months in which to file suit or request reconsideration.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

GLORIA F. ANDERBERG
1540 Grant Street
Apartment 23
Denver, Colorado 80203
Petitioner

February 16, 1984

7

APPENDIX

10-14-83 82-2014

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GLORIA F. ANDERBURG, *as Conservatrix of the Estate of Steven B. Stichler; and* GLORIA F. ANDERBURG, *individually*,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 82-2014.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. NO. 81-M-2241)

Charles T. Trowbridge, Denver, Colorado, for Plaintiff-Appellants.

Janis E. Chapman, Assistant U.S. Attorney (Robert N. Miller, United States Attorney was on the brief) for Defendant-Appellee.

Before, SETH, Chief Judge, DOYLE, and MILLER,* Circuit Judges.

*Of the United States Court of Appeals for the Federal Circuit sitting by designation.

MILLER, Circuit Judge.

This appeal is from an order of the district court, entered on the Government's motion for summary judgment, dismissing, for lack of jurisdiction, appellant's action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680. Her administrative claim for damages was presented to the Veterans Administration in Denver, Colorado, which denied the claim by registered letter dated and mailed on October 30, 1980, and received on November 3. She sought reconsideration by a letter dated and sent by regular mail on April 30, 1981, and received in the Office of District Counsel on May 1.[1] The district court held that the request for reconsideration was not timely filed, so that the court did not have jurisdiction. We affirm.

The Government points out that if appellant had chosen to file her claim in the district court after the initial denial she was required to do so "within six months after the date of mailing . . . of notice of denial of the claim by the agency to which it was presented," citing 28 U.S.C. § 2401(b); and that 28 C.F.R. § 14.9(b) provides that a request for reconsideration shall be filed "prior to the expiration of the 6-month period provided in 28 U.S.C. 2401(b) . . ." It is the Government's position that "filing" means *receipt* by the agency and, accordingly, appellant's request for reconsideration was not timely filed. Appellant argues that "filing" means *mailing*, so that her request was time-

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[1] A second letter requesting reconsideration and also dated April 30, 1981, was sent by certified mail and received in the Office of District Counsel on May 4, 1981. As will appear, it is unnecessary to consider this letter for purposes of this appeal.

ly; further, that since the statute provides that *mailing* of notice of denial begins the six-month limitation period and since this is made applicable by 28 C.F.R. § 14.9(b) to requests for reconsideration, *mailing* of a request for reconsideration, rather than receipt by the agency, should determine the end of the six-month limitation period, so that her request was timely; otherwise, there was no full six-month period, and the Government would have its cake and eat it too. Thus, the issue is whether mailing of a request for reconsideration or receipt of the request by the agency constitutes "filing" for purposes of 28 C.F.R. § 14.9(b).

We are satisfied that the Government's position must prevail. The statute, 28 U.S.C. § 2401(b), refers to "denial of the claim by the agency to which it was *presented*." (Emphasis added.) 28 C.F.R. § 14.2(a) provides:

> For purposes of the provisions of 28 U.S.C. § 2401(b) . . . a claim shall be deemed to have been *presented* when a Federal agency *receives* from a claimant . . . an executed Standard Form 95 or other written notification of an incident . . . accompanied by a claim for money damages in a sum certain . . . (Emphasis added.)

Nowhere is there any indication that what constitutes presentment of a request for reconsideration is different from presentment of the claim itself.[2]

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[2] We note that 39 C.F.R. § 912.5 provides: "For purposes of this part, a claim [against the Postal Service] shall be deemed to have been presented when the U.S. Postal Service receives from a claimant . . . an executed Standard Form 95, Claim for Damage or Injury . . . accompanied by a claim for money damages in a sum certain . . ." It would seem desirable that 28 C.F.R. § 14.9(b) be amended to contain similar language to expressly reflect the Government's practice.

Moreover, appellant's approach would tend to violate the principle that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soreano v. United States*, 352 U.S. 270, 276 (1957). The limitation period in 28 U.S.C. § 2401(b) is not to be extended for equitable considerations. *Childers v. United States*, 442 F.2d 1299, 1303 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971),[3] *See also Frey v. Woodard*, 481 F. Supp. 1152, 1153 (E.D. Pa. 1979).

The order of the district court is affirmed.

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[3] We are not unmindful of possible hardship arising from strict construction of a period of limitations, but remedial action lies with the Congress through statutory change or a private bill for relief. *Compare Steele v. United States*, 390 F. Supp. 1109, 1112 (S.D. Cal. 1975).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-M-2241

GLORIA F. ANDERBURG, *as Conservatrix of the Estate of Steven B. Stichler, and* GLORIA F. ANDERBURG, *individually, Plaintiffs,*

v.

UNITED STATES OF AMERICA, *Defendant.*

ORDER FOR SUMMARY JUDGMENT OF DISMISSAL

This is an action under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680. The defendant has filed a motion for summary judgment, asserting a lack of jurisdiction because of a failure to file the complaint within six (6) months after the date of mailing of notice of the final denial of the administrative claim, as required by 28 U.S.C. § 2401(b). The facts set forth in the affidavits accompanying the motion have not been disputed. The administrative claim for damages was denied by the Veteran's Administration and notice of that denial was given by a registered letter, dated and mailed on October 30, 1980. The plaintiff sought reconsideration by a letter request, dated April 30, 1981, sent by certified mail and received in the Office of the District Counsel on May 4, 1981. A second letter requesting reconsideration, also dated April 30, 1981, was sent by regular mail and received in the Office of the District Counsel on May 1, 1981. On July 2, 1981, the Veteran's Administration sent a letter notifying the plaintiff that the request for reconsideration was not timely filed as required by 28 C.F.R. § 14.9(b). This civil action was filed December 31, 1981.

The plaintiff contends that the request for reconsideration was mailed on April 30, 1981, and was therefore submitted within the six-month period required by the regulation. The only question presented is whether "filing" as used in 28 C.F.R. § 14.9(b) means receipt or mailing of the request for reconsideration. My conclusion is that "filing" means receipt and that, accordingly, the notice of denial mailed October 30, 1980 is the time for measuring the six-month requirement under 28 U.S.C. § 2401(b). Therefore, this claim is barred. It is, therefore,

ORDERED, that this civil action is dismissed for lack of jurisdiction.

Dated: June 18, 1982

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-M-2241

GLORIA F. ANDERBURG, *as Conservatrix of the Estate of Steven B. Stichler, and* GLORIA F. ANDERBURG, *individually,*
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Upon consideration of the motion designated Plaintiffs' Motion for New Trial, filed June 28, 1982, it is

ORDERED, that the motion is denied.

Dated: June 29, 1982

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM — October 14, 1983

Before Honorable Oliver Seth, Honorable William E. Doyle and Honorable Jack R. Miller*, Circuit Court Judges

GLORIA F. ANDERBURG, *as Conservatrix of the Estate of Steven B. Stichler, and* GLORIA F. ANDERBURG, *individually,*
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

JUDGMENT
No. 82-2014
(D.C. #81-M-2241)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, Clerk
By

Robert L. Hoecker
Chief Deputy Clerk

*of the United States Court of Appeals for the Federal Circuit, sitting by designation.

J-1 6/83

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-M-2241

GLORIA F. ANDERBURG, *as Conservatrix of the Estate of Steven B. Stichler, and* GLORIA F. ANDERBURG, *individually,*
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT OF DISMISSAL

Pursuant to and in accordance with the Order for Summary Judgment of Dismissal entered by the Honorable Richard P. Matsch, United States District Court Judge, signed and filed on June 18, 1982, it is

ORDERED that the defendant's motion for summary judgment is granted, and it is

FURTHER ORDERED that this civil action and complaint be and are hereby dismissed for lack of jurisdiction, and it is

FURTHER ORDERED that the defendant shall have its costs of action upon the filing of a Bill of Costs with the Clerk of this Court within ten (10) days after entry of this judgment.

DATED at Denver, Colorado, this 18th day of June, 1982.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

BY

Stephen P. Ehrlich, Chief Deputy Clerk